MOTION FILED

SEP 2 3 2002

3

No. 02-271

IN THE

Supreme Court of the United States

IN RE AGENT ORANGE PRODUCT LIABILITY LITIGATION:

DOW CHEMICAL COMPANY, MONSANTO COMPANY, ET AL.,

Petitioners,

v.

DANIEL RAYMOND STEPHENSON, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Of Counsel:
HUGH F. YOUNG, JR.
PRODUCT LIABILITY
ADVISORY COUNCIL, INC.
1850 Centennial Park Drive
Suite 510
Reston, Va. 20191
(703) 264-5300

JOHN H. BEISNER
(Counsel of Record)
MARC E. ISSERLES
O'MELVENY & MYERS LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-5300

Counsel for Amicus Curiae
Product Liability Advisory Council

28 pp

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE PRODUCT LIABILITY ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

The Product Liability Advisory Council ("PLAC") hereby moves, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amicus curiae* in support of petitioners. Consent to the filing of this brief has been obtained from counsel for the petitioners. Counsel for respondents have refused consent. Copies of the letters giving and refusing consent have been lodged with the Court.

PLAC is a nonprofit association with over 100 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 525 briefs as *amicus curiae* in both state and federal courts, including numerous briefs in cases presenting questions about the interpretation of the procedural rules governing class actions and class action settlements – questions at the heart of this case.

As frequent participants in, and observers of, class action settlements and litigation, PLAC's members have a real and concrete interest in the resolution of the questions presented in this case. In particular, PLAC and its members have grave concerns about the effect that the ruling below will have on the fair and efficient resolution of class disputes. By granting absent class members a broad right to bring collateral attacks to final class action judgments and settlements, the rule adopted by the court below threatens to upset the finality of countless class action dispositions, prevent conclusive

resolution of pending and future class actions, reduce the incentive for defendants to enter class action settlement agreements, and undermine the utility and basic fairness of the class action device. PLAC further believes these important questions of national importance warrant review because of the conflict among several lower courts of appeals, and because of the serious confusion these courts have faced interpreting this Court's applicable precedents.

For these reasons, PLAC respectfully requests that the Court grant the motion for leave to file the attached brief *amicus curiae* in support of the petition.

Respectfully submitted,

Of Counsel:
HUGH F. YOUNG, JR.
PRODUCT LIABILITY
ADVISORY COUNCIL, INC.
1850 Centennial Park Drive
Suite 510
Reston, Va 20191
(703) 264-5300

JOHN H. BEISNER
(Counsel of Record)
MARC E. ISSERLES
O'MELVENY & MYERS LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-5300

Counsel for Amicus Curiae
Product Liability Advisory Council

QUESTIONS PRESENTED

1. Whether absent class members are precluded from relitigating the issue of adequacy of representation through a collateral attack on a class settlement, after class members had a full opportunity to opt out, object, and appeal, and after both the trial court and the court of appeals, in the course of approving the settlement, expressly determined that the class representatives adequately represented the entire class.

2. Whether, if collateral attack is permissible, the "adequacy of representation" issue is properly determined as of the time of the original litigation or in light of events and changes in the law occurring years after the settlement has become final and all of the settlement proceeds have been disbursed.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

INTRODUCTION 2

REASONS FOR GRANTING THE WRIT 3

I. A BROAD RIGHT TO RELITIGATE ADEQUACY OF REPRESENTATION ISSUES WOULD THREATEN THE FINALITY OF COUNTLESS CLASS ACTION DECISIONS, SUBVERTING CORE CLASS ACTION PURPOSES 6

II. THE DECISION BELOW WOULD INAPPROPRIATELY EXPAND THE REACH OF THIS COURT'S *AMCHEM* DECISION 12

III. THIS COURT SHOULD GRANT THE WRIT TO RESOLVE SERIOUS INTERPRETIVE CONFUSION ARISING FROM ITS OWN PRECEDENTS 14

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

CASES

Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997) ..... *passim*

Bano v. Union Carbide Corp., 273 F.3d 120 (2d Cir. 2001) 11

Epstein v. MCA, Inc., 179 F.3d 641 (9th Cir.), *cert. denied*, 528 U.S. 1004 (1999) ..... *passim*

Federated Department Stores, Inc. v. Moitie, 452 U.S. 394 (1981) 8

Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973) 4

Grimes v. Vitalink Communications Corp., 17 F.3d 1553 (3d Cir. 1994) 4

Hansberry v. Lee, 311 U.S. 32 (1940) ..... *passim*

In re Agent Orange Prod. Liab. Litig., 818 F.2d 145, 167 (2d Cir. 1987), *cert. denied*, 487 U.S. 1004 (1988) 7

In re Agent Orange Prod. Liab. Litig., 996 F.2d 1425, 1437 (2d Cir. 1993), *cert. denied*, 510 U.S. 1140 (1994) 7

In re Exxon Valdez, 229 F.3d 790 (9th Cir. 2000), *cert. denied*, 533 U.S. 903 (2001) 11

TABLE OF AUTHORITIES
(continued)

Page(s)

In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768 (3d Cir. 1995) 11

King v. S. Cent. Bell Tel. & Tel. Co., 790 F.2d 524 (6th Cir. 1986) 4

Matsushita Electric Industrial Co. v. Epstein, 516 U.S. 367 (1996) ..... *passim*

Nottingham Partners v. Trans-Lux Corp., 925 F.2d 29 (1st Cir. 1991) 4

Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) 12, 13

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) ..... *passim*

Plummer v. Chem. Bank, 668 F.2d 654 (2d Cir. 1982) 12

Reed v. Allen, 286 U.S. 191 (1932) 8

Reynoldsville Casket Co. v. Hyde, 514 U.S. 749 (1995) 14

Southern Pac. R. Co. v. United States, 168 U.S. 1 (1897) 7, 8

OTHER AUTHORITIES

William T. Allen, *Finality of Judgments in Class Actions, A Comment on* Epstein v. MCA, Inc., 73 N.Y.U. L. Rev. 1149 (1998) 5, 10

TABLE OF AUTHORITIES
(continued)

Page(s)

Marcel Kahan & Linda Silberman, *The Inadequate Search for "Adequacy" in Class Actions: A Critique of* Epstein v. MCA, Inc., 73 N.Y.U. L. Rev. 765 (1998) ..... *passim*

Marcel Kahan & Linda Silberman, *The Proper Role for Collateral Attack in Class Actions: A Reply to Allen, Miller & Morrison*, 73 N.Y.U. L. Rev. 1193 (1998) 9

Geoffrey P. Miller. *Full Faith and Credit to Settlements in Overlapping Class Actions: A Reply to Professors Kahan and Silberman*, 73 N.Y.U. L. Rev. 1167 (1998) 5, 9

Alan B. Morrison, *The Inadequate Search for "Adequacy" in Class Actions: A Brief Reply to Professors Kahan and Silberman*, 73 N.Y.U. L. Rev. 1179 (1998) 5

Linda Silberman, *The Vicissitudes of the American Class Action—With A Comparative Eye*, 7 Tul. J. Int'l & Comp. L. 201 (1999) 10

Patrick Woolley, *The Availability of Collateral Attack for Inadequate Representation in Class Suits*, 79 Tex. L. Rev. 383 (2000) 5, 17

18A Charles Alan Wright, et al., *Federal Practice and Procedure* § 4455 (2d ed. 2002) 5

IN THE

Supreme Court of the United States

IN RE AGENT ORANGE PRODUCT LIABILITY LITIGATION:

DOW CHEMICAL COMPANY, MONSANTO COMPANY, ET AL.,

Petitioners,

v.

DANIEL RAYMOND STEPHENSON, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

This brief is filed on behalf of the Product Liability Advisory Council as *amicus curiae* in support of petitioners.[1]

INTEREST OF *AMICUS CURIAE*

The Product Liability Advisory Council ("PLAC") is a nonprofit association with over 100 corporate members representing a broad cross-section of American and interna-

[1] Consent from counsel for petitioners has been filed with the Clerk of this Court. Because counsel for respondents have refused to consent, this brief is accompanied by a motion for leave to file a brief as *amicus curiae*. No counsel for a party to this case authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

tional product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 525 briefs as *amicus curiae* in both state and federal courts, including numerous briefs in cases presenting questions about the interpretation of the procedural rules governing class actions and class action settlements – questions at the heart of this case. As frequent participants in, and observers of, class action settlements and litigation, PLAC's members have a real and concrete interest in the resolution of the questions presented by the petition in this case.

INTRODUCTION

This case presents a question of profound importance in the class action arena: Is a class action judgment or settlement *ever* final? The Second Circuit answered "no." It did so not only by dramatically reopening the Agent Orange global settlement agreement, long thought a closed chapter of American legal history. In the process, the court also created a novel rule of law that affords absent class members a broad – and potentially boundless – right to collaterally attack a class action settlement on adequacy of representation grounds.

In the Second Circuit's view, it does not matter that the absent class members received notice and had a full opportunity to opt out of the proceedings; it does not matter that those members had an opportunity to raise objections relating to the adequacy of the class representatives to the trial court, but made no effort to do so; it does not matter that the trial court *expressly determined* that the class representatives were in fact adequate representatives of the entire class; it

does not matter that that determination was *expressly affirmed* (twice) on appeal, and that those decisions are no longer reviewable. For the court below, the *only* relevant consideration is whether the absent class member can articulate some reason why, with the full benefits of 20/20 hindsight and recent developments in the law, the representation appears less than fully adequate.

If upheld, the Second Circuit's ruling could, in principle, threaten to upset the finality of *every* class action settlement or judgment ever reached. And by radically destabilizing settled class action determinations, the court's rule would render the class action device a precarious (and thus highly undesirable) method for resolving disputes. It would, in effect, place a question mark after every "It is so ordered" entered on the Nation's class action docket. Yet it is precisely in the class action context that finality, repose, and voluntary settlements of disputes are perhaps most highly valued and urgently needed. In other words, the Second Circuit's decision erects a special class action collateral attack rule that will inevitably – and quite perversely – thwart the primary objectives of the class action device. Indeed, it is difficult to imagine a rule of law that would more seriously undermine the core utility and rationale of class actions.

No constitutional or statutory provision requires such a rule, no precedent of this Court supports it, and no sensible policy objective would be furthered by its adoption. The Court should grant the writ, resolve the conflict in the federal courts of appeals on this issue (and the related confusion arising from this Court's own precedents), and reject the Second Circuit's unjustifiable collateral attack rule.

REASONS FOR GRANTING THE WRIT

The petition persuasively demonstrates that the questions presented involve issues of profound national importance; that there is a conflict between the decision below and *Epstein v. MCA, Inc.*, 179 F.3d 641 (9th Cir.), *cert. denied*, 528

U.S. 1004 (1999),[2] *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29 (1st Cir. 1991), and *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553 (3d Cir. 1994);[3] and that the

---

[2] The Second Circuit suggested that its collateral attack rule was, in fact, consistent with the rule announced in *Epstein*. App. 14a n.7. Nothing could be further from the truth. *Epstein* squarely held that collateral review of a prior adequacy of representation determination is barred where the prior court afforded the class member a full and fair opportunity to participate in the proceeding. *See Epstein*, 179 F.3d at 648-49. The court below attempted to reconcile its holding with *Epstein* by explaining that "neither the district court nor this Court has determined the adequacy of representation *with respect to these plaintiffs* whose injuries did not arise until after the settlement expired." App. 14a n.6 (emphasis in original). But that claim is demonstrably false because, as the court elsewhere conceded, App. 13a, the district court and the Second Circuit previously concluded in this litigation that the *entire class* was adequately represented – a conclusion that necessarily embraces a determination of adequacy "with respect to these plaintiffs." In any event, *Epstein* only requires *an* adequacy determination pursuant to fair procedures, not a *correct* or *complete* adequacy determination The Second Circuit's obvious sleight of hand cannot minimize the direct conflict between the two courts' holdings.

[3] The decision in *Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973), is fairly read to support the Second Circuit's collateral attack rule, as the Second Circuit itself thought, App. 15a, thus deepening the circuit split on the question presented in the petition. As Petitioners suggest, Pet. 10 n.3, *Gonzales* can be distinguished in part on the ground that the allegedly inadequate representation in that case took place exclusively *after* termination of the initial lawsuit – a factual scenario not present in this case. But the court in *Gonzales* adopted a clear rule authorizing collateral attacks on the propriety of the initial adequacy determination. *See Gonzales*, 474 F.2d at 72 (collateral attack inquiry includes questioning whether "the first suit correctly determine[d], initially, that the representative would adequately represent the class"). That is the very rule that the Second Circuit adopted and applied below. *Compare also King v. S. Cent. Bell Tel. & Tel. Co.*, 790 F.2d 524, 530 (6th Cir. 1986) (holding that "adequacy of representation is a factual finding for the court before whom the class action is pending," and rejecting collateral attack on that basis).

Second Circuit's rule is inconsistent with settled principles of *res judicata* and the finality of judgments.

Instead of reiterating those arguments here, *amicus* PLAC will advance three additional, related reasons why the Court should grant the writ. *First*, if adopted as the law of the land, the Second Circuit's collateral attack rule would threaten to upset the finality of every class action settlement or judgment reached to date. In addition, it would preclude any truly final resolution of class action disputes in the future, create tremendous disincentives for parties to enter into settlement agreements, and undermine core objectives of the class action procedural device. The Court should grant the petition to prevent these serious, adverse consequences.

Second, the petition should be granted to prevent a radical expansion of this Court's decision in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). According to the Second Circuit, its collateral attack rule necessarily requires an examination of past adequacy of representation determina-

---

The question presented in this case has also generated a lively debate in the academic literature. *Compare* Marcel Kahan & Linda Silberman, *The Inadequate Search for "Adequacy" in Class Actions: A Critique of* Epstein v. MCA, Inc., 73 N.Y.U. L. Rev. 765 (1998) ["Kahan & Silberman I"] (rejecting broad collateral attack rule); William T. Allen, *Finality of Judgments in Class Actions, A Comment on* Epstein v. MCA, Inc., 73 N.Y.U. L. Rev. 1149 (1998) (same); Geoffrey P. Miller. *Full Faith and Credit to Settlements in Overlapping Class Actions: A Reply to Professors Kahan and Silberman*, 73 N.Y.U. L. Rev. 1167 (1998) (same), *with* Patrick Woolley, *The Availability of Collateral Attack for Inadequate Representation in Class Suits*, 79 Tex. L. Rev. 383 (2000) (defending collateral attack); Alan B. Morrison, *The Inadequate Search for "Adequacy" in Class Actions: A Brief Reply to Professors Kahan and Silberman*, 73 N.Y.U. L. Rev. 1179 (1998) (defending limited collateral attack, and disputing alleged adverse consequences of such attacks); *see also* 18A Charles Alan Wright, et al., *Federal Practice and Procedure* § 4455, at 485-86 (2d ed. 2002) (criticizing *Epstein* remand decision for ignoring traditional preclusion principles in adopting collateral attack bar for efficiency purposes).

tions pursuant to current legal standards, as articulated by this Court in *Amchem*. Yet *Amchem* plainly did not authorize the reopening of long-finalized class action judgments for *de novo* review to determine compliance with *Amchem*'s standards. If the Second Circuit's collateral attack rule remains the law, it would, in effect, inappropriately expand the substantive reach of *Amchem* itself.

Third, the Second Circuit's ruling presents serious interpretive questions about the meaning of three of this Court's precedents: *Hansberry v. Lee*, 311 U.S. 32 (1940), *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), and *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1996). This interpretive confusion has, in important ways, contributed to the conflict among the circuits on the questions presented in the petition. Indeed, lower courts have read the very same decisions of this Court to support *both* the rule permitting collateral attacks *and* the rule barring them. Because only this Court can explain the meaning of its own precedents, awaiting additional interpretive glosses by the lower courts would serve no evident purpose, and simply delay resolution of the existing conflict on an issue of tremendous national importance.

I. A BROAD RIGHT TO RELITIGATE ADEQUACY OF REPRESENTATION ISSUES WOULD THREATEN THE FINALITY OF COUNTLESS CLASS ACTION DECISIONS, SUBVERTING CORE CLASS ACTION PURPOSES.

The decision below disrupts one of the most noteworthy class action settlements on record. It does so despite nearly two decades of reliance on the finality of the settlement – reliance created and sustained through extensive judicial proceedings. Those judicial proceedings expressly and exhaustively resolved, on multiple occasions, the very subject matter of the plaintiffs' complaint here – the adequacy of the

class representation. Still worse, those proceedings were conducted and approved by the very court that has now, years later, reached a different view in the very same case. *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 167 (2d Cir. 1987), *cert. denied*, 487 U.S. 1004 (1988); *In re Agent Orange Prod. Liab. Litig.*, 996 F.2d 1425, 1437 (2d Cir. 1993), *cert. denied*, 510 U.S. 1140 (1994).

Yet the inequities here, serious though they may be, are but the tip of the iceberg. In principle, the rule of law that the court announced could permit dissatisfied class members to wage collateral attacks on any and all class action decisions – whether reached in state or federal court, and whether reached last week, last decade, or perhaps even a quarter-century ago. The only requirement is that the plaintiff mounting the collateral attack assert, on the basis of subsequent developments or new legal standards not applicable at the time the class originally was certified, that his or her particular interests were not adequately represented.[4] And the only discernible protection for class action defendants would be the purely accidental fact that, in some cases, there may be no class members who wish to bring such an attack.

But that is cold comfort indeed, and plainly insufficient given the judiciary's core obligation to secure the finality of legal judgments. *See, e.g., Southern Pac. R. Co. v. United*

---

[4] To be sure, a mere allegation of inadequate representation would not suffice to reopen a case; the plaintiff still must prove that the representation was in fact inadequate. But the serious risk to finality and repose is created by the very *willingness* of courts to entertain the collateral attack in the first place. This is especially so given that adequacy of representation determinations often involve complex, fact-specific judgment calls, presenting the very real risk that the collateral court, with no first-hand knowledge of the class proceedings, may frequently err when asked to second-guess (many years later) the initial adequacy determination. *See* Kahan & Silberman I, *supra*, at 789 n.104 (uncertainty "about when the standard of 'adequate representation' has been met underscores the need to limit the availability of collateral attack").

States, 168 U.S. 1, 49 (1897) (Harlan, J.) ("Th[e] general rule [of *res judicata*] is demanded by the *very object for which civil courts have been established*, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination") (emphasis added). That obligation serves fundamental principles of societal justice,[5] and must take precedence *even* over claims that equity or unforeseen circumstances suggest a different result in a particular case. *See Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981) ("'Simple Justice' is achieved when a complex body of law developed over a period of years is evenhandedly applied. The doctrine of *res judicata* serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case."); *Reed v. Allen*, 286 U.S. 191, 199 (1932) ("mischief which would follow the establishment of precedent for . . . disregarding this salutary doctrine against prolonging strife *would be greater than* the benefit which would result from relieving some case of individual hardship") (emphasis added).

The Second Circuit's rule threatens not only the finality of class action decisions past, but all pending and future class proceedings as well. Without some secure promise of finality, class actions will lose much – if not all – of their utility as a dispute resolution mechanism. No matter how diligently the litigants or the court attempt to craft a fair resolution of a class conflict – including sustained efforts to ensure the adequate representation of absent class members – substantial doubts as to the binding effect of any determination would

[5] *See, e.g., Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 400 (1981) (*res judicata* is a rule of "fundamental and substantial justice" and a rule "'of public policy and of private peace'" (quoting *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299 (1917)); *Reed v. Allen*, 286 U.S. 191, 198-99 (1932) (doctrine of *res judicata* was "conceived in the light of the maxim that the interest of the state requires that there be an end to litigation – a maxim which comports with common sense as well as public policy").

remain. There would always be a risk – as demonstrated in this very case – that some absent class member might emerge years later to announce his discontent for the first time. *See* Miller, *supra*, at 1189 ("All class action settlements, however generous to the class, however competently litigated, and however much the product of adversarial, arm's length negotiations between the parties, would be open to collateral attack in a subsequent forum. There is nothing the parties in the first forum can do to prevent this danger.").

Moreover, the collateral attack rule gives class members a powerful incentive to remain silent during the class action proceedings, and to complain about perceived inadequacies of representation only if the relief obtained by the rest of the class later seems inadequate. *See id.* Such an incentive would be grossly unfair insofar as it gives class members, in effect, a choice of remedies and an all too tempting opportunity for strategic behavior. In addition, it would deprive the certifying court of information that it needs to reach a fair and complete adequacy determination. Thus, the collateral attack rule promises *numerous* adequacy of representation findings by multiple courts – *none of which* will be as reliable as the determination that the certifying court could make *if* collateral attacks were barred. In the words of the leading academic critics of the collateral attack rule, the far better approach is to "Do it once, but do it right." Marcel Kahan & Linda Silberman, *The Proper Role for Collateral Attack in Class Actions: A Reply to Allen, Miller & Morrison*, 73 N.Y.U. L. Rev. 1193, 1199 (1998).

The destabilizing aspects of the Second Circuit's rule are particularly harmful when one considers its effect on a litigant's incentive to settle. In a litigation context, the loss of certainty that the Second Circuit's rule would engender is costly enough. But those costs are magnified considerably because that very uncertainty will also remove much – if not all – of a class defendant's incentive to reach a global settle-

ment of class claims. Why would any rational defendant agree to settle if it cannot achieve peace and repose? At the very least, the risk that a class settlement might be disturbed, years later, by a now-silent class member will substantially discourage defendants from entering into any class settlement. *See* Kahan & Silberman I, *supra*, at 779 & n.66 (possibility of one successful collateral attack, however weak its merits, creates a "potential for double liability [that] will increase the expected liability of defendants and severely impede the ability to settle a class to start with").

Finally, the Second Circuit's rule is especially troubling because it undermines core objectives of the class action procedural device. One of those core objectives is to prevent duplicative litigation of the same basic issues – streamlining complex and multiparty litigation into a single proceeding. That streamlining, and the judicial efficiencies that result, can occur only if the single class proceeding is a conclusive and binding one. The Second Circuit's broad collateral attack rule directly threatens that core, class action objective by sanctioning – indeed by promoting – duplicative litigation of the adequacy of representation issue. In other words, the Second Circuit's collateral attack rule is, perversely, a special rule for class actions that actually fosters one of the key problems class actions were designed to solve. *See* Linda Silberman, *The Vicissitudes of the American Class Action—With A Comparative Eye*, 7 Tul. J. Int'l & Comp. L. 201, 214 (1999) (collateral attacks on adequacy determinations "represent serious danger to the finality that is the essence of class litigation and settlements"); Kahan & Silberman I, *supra*, at 779 ("From the perspective of efficiency . . . multiple determinations of the same issue undermine the very efficiencies sought to be achieved by the class action mechanism"); Allen, *supra*, at 1159-60 (collateral attacks "reinvent[] the problem of inefficiency and second guessing that is solved by the rule of finality and recognition of judgments").

Likewise, many courts have recognized that the general public policy favoring voluntary settlements is paramount in the class action context because of the administrative burdens that complex class litigation imposes on the courts. *See Bano v. Union Carbide Corp.*, 273 F.3d 120, 129 (2d Cir. 2001) ("public interest in amicable resolution of cases is particularly strong in the context of mass tort and similar litigation"); *In re Exxon Valdez*, 229 F.3d 790, 795 (9th Cir. 2000) ("general policy of federal courts to promote settlement before trial is even stronger in the context of large-scale class actions"), *cert. denied*, 533 U.S. 903 (2001); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 805 (3d Cir. 1995) (noting "urgency of [public] policy [favoring settlements] in complex actions that consume substantial judicial resources and present unusually large risks for the litigants"). Yet despite the pressing nature of this public policy concern in the class action context, the Second Circuit's collateral attack rule makes voluntary settlement of class actions uniquely difficult to achieve.

Given all of these difficulties, there can be no real question that the Second Circuit's rule poses a serious threat to the viability of the class action procedural device. The real question is whether there is *any* possible justification for such a rule. And on this central question, the Second Circuit provided no answer whatsoever. The truth is that the collateral attack rule will do little else but preclude any hope of finality in class action proceedings; encourage strategic behavior by absent class members; deprive certifying courts of information necessary to render a considered and complete adequacy determination; and remove the incentive to enter class action settlement agreements. *All* of those consequences can be avoided simply by requiring absent class members to make their adequacy of representation objections known to the certifying court. If they fail to do that, despite a full and fair opportunity to do so, that should be the end of

the matter.[6]

II. THE DECISION BELOW WOULD INAPPROPRIATELY EXPAND THE REACH OF THIS COURT'S *AMCHEM* DECISION.

Petitioners rightly criticize the court below, not only for permitting a collateral attack, but for resolving that attack by applying legal standards of adequate representation derived from this Court's recent decision in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *see also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856 (1999). Those decisions emphasized the certifying court's responsibility to provide "structural assurance[s] of fair and adequate representation for the diverse groups and individuals affected" by a class action settlement. *Amchem*, 521 U.S. at 626; *Ortiz*, 527 U.S. at 856. With this emphasis, and with *Amchem*'s related holding that settlement-only class actions must satisfy the procedural prerequisites necessary to certify a class for trial, *see Amchem*, 521 U.S. at 613-22,[7] *Amchem* "heralded a new era of judicial scrutiny of class action certification and settlement." *Epstein*, 179 F.3d at 651 (Thomas, J., dissenting); *see Ortiz*, 527 U.S. at 856 ("it is obvious *after Amchem*" that subclasses with separate representation are needed to eliminate

[6] To be sure, exceptions may be appropriate in certain circumstances, such as where the initial determination of representational adequacy was based on material misrepresentations. *See* Kahan & Silberman I, *supra*, at 782. However, no such circumstances are present here, and the Second Circuit's collateral attack is plainly not so limited.

[7] Prior to *Amchem*, the majority rule in the lower courts was that a settlement-only class action need not satisfy ordinary class action prerequisites. Instead, courts were charged with ensuring that settlements were "fair, adequate and reasonable." *See, e.g., Plummer v. Chem. Bank*, 668 F.2d 654, 658 (2d Cir. 1982); *see also Amchem*, 521 U.S. at 618, 621-22 (noting that only one federal circuit had taken the contrary approach adopted by the Court in *Amchem*, and holding that federal courts lacked power to substitute for Rule 23's prerequisites the rule that "if a settlement is 'fair,' then certification is proper").

conflicting interests and to provide structural assurance of fair and adequate representation") (emphasis added).

Whether or not the adequacy findings in this case could survive scrutiny under this new legal regime – the Second Circuit held they could not, App. 18a-19a – begs the question whether it is appropriate to engage in that sort of retrospective analysis in the first place. Plainly, it is not. Most obviously, it creates the strong possibility that collateral courts will, as in this very case, simply rewrite legal history and settled judgments, rendering legally insufficient adequacy decisions that were *completely valid* under the law applicable at the time they were reached. In the case of pre-*Amchem* settlement-only class actions, where there was no requirement for a full-blown certification analysis, *see supra* n.7, it is doubtful that *any* express adequacy of representation determination could survive the kind of rigorous scrutiny that we have come only recently to expect. *See, e.g., Ortiz*, 527 U.S. at 856; *see also Amchem*, 521 U.S. at 618 (noting pre-*Amchem* standard that "adequacy of class representation . . . is ultimately determined by the settlement itself" (quoting *White v. Nat'l Football League*, 41 F.3d 402, 408 (8th Cir. 1994)). In short, the retroactive application of current legal standards significantly compounds the problems inherent in a collateral attack rule. It ensures that, however many class judgments and settlements ultimately are collaterally attacked, a good many of those attacks are bound to succeed solely because of a change in the applicable legal standards.

Accordingly, Petitioners persuasively argue (in the Second Question Presented) that *if* collateral attacks are deemed permissible in certain circumstances, then such challenges should be based on the facts and law that existed at the time the first adequacy determination was made. Pet. 19-25. To the extent collateral attacks are permitted at all, such a modification of the Second Circuit's rule would certainly be necessary. But it is important to understand that, in the Second

Circuit's view, the retroactive application of the *Amchem* decision followed *inevitably* from its decision to permit the collateral attack in the first place. Were there any doubt on that score, the first sentence of the Second Circuit's opinion makes plain its intent: "This appeal requires us to determine the effect of the Supreme Court's landmark class action decision in *Amchem* . . . and *Ortiz* . . . on a previously settled class action concerning exposure to Agent Orange during the Vietnam War." App. 1a-2a.

Because retroactive application of current adequacy of representation standards (here, *Amchem*'s standards) is part and parcel of the Second Circuit's rule permitting collateral attacks, the case for reviewing that rule (and for rejecting it outright) becomes all the more persuasive. Nothing in *Amchem* remotely suggests that this Court intended its decision to have an "effect" on *any* "previously settled class action[s]." App. 1a-2a. Indeed, any such intention would have been extraordinary, and contrary to foundational principles limiting retroactive application of new decisions to *pending* cases. *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758 (1995). If permitted to stand, the Second Circuit's collateral rule would effect a dramatic expansion of *Amchem*'s substantive reach, compelling application of that decision to long-finalized, class dispositions that were plainly beyond the scope of *Amchem*'s holding. That alone is reason to grant the writ.

III. THIS COURT SHOULD GRANT THE WRIT TO RESOLVE SERIOUS INTERPRETIVE CONFUSION ARISING FROM ITS OWN PRECEDENTS.

The decision below raises serious interpretive questions about the meaning of three of this Court's own precedents: *Hansberry v. Lee*, 311 U.S. 32 (1940), *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985), and *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1996). In-

deed, the conflict in the lower courts on the permissibility of collateral attacks arises in important respects from that very interpretive confusion. The confusion in this area is so pervasive that, in several instances, the lower courts have read the very same opinion of this Court to support *both* the rule permitting collateral attacks *and* the rule barring them. Because only this Court can explain the meaning of its own precedents, no purpose would be served in awaiting additional interpretive glosses by the lower courts. The Court should grant the writ now and resolve both this interpretive confusion and the circuit conflict that it has produced.

Hansberry v. Lee. The Second Circuit based its broad authorization of collateral attacks on this Court's seminal decision in *Hansberry v. Lee*, 311 U.S. 32 (1940). The Court in *Hansberry* permitted a collateral attack on a state court class action and held that class action judgments can only bind absent class members where "the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation." *Id.* at 41. In the view of the court below, *Hansberry* stands for the broad proposition that collateral attacks based on inadequacy of class representation are permissible, and thus "amply support[s]" the "propriety of a collateral attack" such as that brought by respondents. App. 14a.

By contrast, in *Epstein*, the Ninth Circuit read the very same case to support the contrary rule that the *only* permissible collateral attack is one challenging the procedures employed by the initial court. The court based that conclusion on *Hansberry*'s holding that "there has been a failure of due process *only* in those cases where it cannot be said that the *procedure adopted*, fairly insures the protection of the interests of absent parties who are to be bound by it." *Epstein*, 179 F.3d at 648 (quoting *Hansberry*, 311 U.S. at 42)). In other words, the Ninth Circuit thought its "procedures-only"

collateral attack rule followed from *Hansberry*'s understanding of the due process guarantee of adequate representation. *Epstein*, 179 F.3d at 648 ("Due process requires that an absent class member's right to adequate representation be protected by the adoption of the appropriate procedures by the certifying court and by the courts that review its determinations; due process does not require collateral second-guessing of those determinations and that review").

Hansberry obviously cannot support two diametrically opposed collateral attack rules at the same time. But which reading of *Hansberry* is correct? Only this Court can decide, and it is essential that it do so now.

Phillips Petroleum v. Shutts. The court below also thought that *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), supported its broad collateral attack rule in two respects. First, it pointed to the Court's statement in *Shutts* that "a court adjudicating a dispute may not be able to predetermine the res judicata effect of its own judgment," *Shutts*, 472 U.S. at 805 – a statement it read to suggest that a collateral attack must be available to examine the legal propositions that would be necessary in order to afford a prior judgment preclusive effect. App. 14a. In addition, the Second Circuit placed emphasis on *Shutts*' statement that "the Due Process Clause of course requires that the named plaintiff *at all times* adequately represent the interests of the absent class members," *Shutts*, 472 U.S. at 812 (emphasis added) – a statement it apparently read to support the permissibility of continued collateral attacks to test the adequacy of representation, even long after the litigation terminates. App. 18a; *see also Matsushita*, 516 U.S. at 395-96 (Ginsburg, J., concurring in part and dissenting in part) (reading phrase "at all times" to mean that the "class representative's duty to represent absent class members adequately is a continuing one," and therefore supports the proposition that final class action judgments "remain vulnerable to collateral attack for failure

to satisfy the adequate representation requirement").

Not surprisingly, the Ninth Circuit in *Epstein* declined to read *Shutts* that broadly. It observed that "nowhere in *Shutts* did the Court state or imply that where the certifying court makes a determination of the adequacy of representation in accord with *Shutts*, this determination is subject to collateral review." *Epstein*, 179 F.3d at 648. But far from concluding that the collateral attack issue was therefore open under *Shutts*, the Ninth Circuit went on to derive from that very opinion the *opposite conclusion*. It said that "*Shutts* in fact implies that [collateral] review is unwarranted by emphasizing that the certifying court is charged with protecting the interests of the absent class members." *Id.* at 648.[8]

Again, which reading of *Shutts* is correct? The answer to that question impacts significantly the proper resolution of the question presented in this case. Because only this Court can answer that question definitively, its guidance is needed now.

Matsushita Electric Industrial Co. v. Epstein. In *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1996), this Court held that a state court global settlement must be given preclusive effect in federal court under the Full Faith and Credit Act, even where the state court settlement releases claims within the exclusive jurisdiction of the federal courts. What is far less clear is whether, in reaching this holding, the Court (i) necessarily determined that the representation in the state court judgment was constitution-

---

[8] To make matters yet more complex, some academic commentators have interpreted *Shutts*' recognition of the certifying court's duty to protect absent class members' rights as a powerful demonstration of the need for collateral review. On this view, *Shutts*' emphasis on the certifying court's protective role removes the obligation on a class action plaintiff (unlike a defendant) to "fend for himself" to protect his interests, *Shutts*, 472 U.S. at 809 – the very obligation that a bar on collateral attacks effectively would impose. *See* Woolley, *supra*, at 394-96.

ally adequate, and (ii) if so, whether the *way* in which the Court made that determination is incompatible with a collateral attack rule.

On remand from this Court, the Ninth Circuit in *Epstein* interpreted the majority opinion in *Matsushita* to resolve both of those questions in the affirmative. It said that, despite certain indications in *Matsushita* that the majority may not have resolved the adequacy of representation issue, *Matsushita*, 516 U.S. at 379 n.5; *id.* at 389 (Ginsburg, J., concurring in part and dissenting in part), the only sensible conclusion was that the Court had in fact resolved the issue. If the majority opinion had concluded that the Full Faith and Credit Act gave preclusive effect to the state court settlement *without* first concluding that the state court settlement satisfied due process requirements (including adequacy of representation), the Ninth Circuit reasoned, the Court's conclusion would have been "purely hypothetical." *Epstein*, 179 F.3d at 646. And the Court in *Epstein* refused to "presume that the Court violated Article III by rendering an advisory opinion." *Id.* Moreover, the Ninth Circuit found ample evidence in the majority opinion that the Court had in fact assured itself that the "due process requirements necessary to bind absent class members were met." *Id.* at 645.

Most importantly for present purposes, *Epstein* further explained that the method this Court used to reach that implicit judgment was plainly inconsistent with a broad collateral attack rule. *See id.* at 649 (noting that the Court satisfied itself that the class had been adequately represented in the state court proceeding "*by referencing the Delaware courts' findings on these matters*, rather than by independently determining whether the requirements were met").[9] As the

[9] The court in *Epstein* also emphasized this Court's statement that the class members had advanced an adequacy of representation argument "*in spite of* the [state court's] express ruling, following argument on the issue, that the class representatives fairly and adequately protected the

court in *Epstein* summarized the point: "*Matsushita* itself indicates that broad collateral review of the adequacy of representation . . . is not available." *Id.* at 649.[10]

The Second Circuit, however, did not even mention *Matsushita* in considering whether collateral attacks are permissible. Did the court share Justice Ginsburg's view that the majority in *Matsushita* left the question open? *See Epstein*, 179 F.3d at 652 (Thomas, J., dissenting) (claiming that panel majority rested on "nuances" from this Court's opinion that "cannot bear the weight placed on them"). Did it have some other reason for thinking *Matsushita* inapplicable? We do not know, because the court did not offer an explanation. What we do know is that the rule the Second Circuit ultimately adopted is, in the view of the Ninth Circuit, inconsistent with this Court's holding in *Matsushita*. Whether that

interests of the class." *Matsushita*, 516 U.S. at 379 n.5 (emphasis added); *Epstein*, 179 F.3d at 650 (explaining that that statement, and others, "indicated that the Epstein appellants' challenge to the adequacy of representation in the Delaware proceedings was answered by specific reference to the findings made on the issue in those proceedings").

[10] By contrast, three Justices in *Matsushita* appeared to support the view that collateral attacks based on inadequate representation must be permitted. *See Matsushita*, 516 U.S. at 395-96 (Ginsburg, J., concurring in part and dissenting part, joined by Stevens, J., and Souter, J.) (although states have "first line responsibility" to conduct adequacy of representation inquiry, "[f]inal judgments . . . remain vulnerable to collateral attack for failure to satisfy the adequate representation requirement"); *see also id.* ("A court conducting an action cannot predetermine the res judicata effect of the judgment; that effect can be tested *only in a subsequent action*) (emphasis added). Yet, that same opinion purported *not* to address the "counterargument that the issue of adequate representation was resolved by full and fair litigation in the Delaware Court of Chancery," *id.* at 399 – a counterargument that seems identical to the position ultimately taken by the court in *Epstein* on remand, and rejected by the Second Circuit below. The majority in *Matsushita* did not expressly discuss these apparently conflicting statements; to the extent it spoke to them at all, it spoke, as *Epstein* concluded, implicitly through its judgment.

conclusion ultimately is correct, it appears that one *must* interpret *Matsushita* properly in order to decide whether collateral attacks are permissible. The Second Circuit's silence on the question of *Matsushita's* applicability simply adds to the interpretive confusion.

In light of the pattern of decisions thus far, awaiting further lower court efforts to resolve the interpretive confusion about this Court's precedents would serve no purpose. The Court should act now to provide much needed guidance on these questions of profound national importance.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Of Counsel:
HUGH F. YOUNG, JR.
PRODUCT LIABILITY
ADVISORY COUNCIL, INC.
1850 Centennial Park Drive
Suite 510
Reston, Va. 20191
(703) 264-5300

JOHN H. BEISNER
(Counsel of Record)
MARC E. ISSERLES
O'MELVENY & MYERS LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-5300

Counsel for Amicus Curiae
Product Liability Advisory Council